***United States Court of Appeals***

***for the Second Circuit***


# APPELLANT'S BRIEF

74-2187

IN THE UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

B P/S

THERESE ROBERGE,
On behalf of herself,
her minor children and
all persons similarly
situated,
Plaintiff-Appellants

vs.

PAUL PHILBROOK,
Commissioner of
Social Welfare,
Defendant-Appellee

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On Appeal from the United States District Court

for the District of Vermont

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BRIEF OF PLAINTIFF-APPELLANTS

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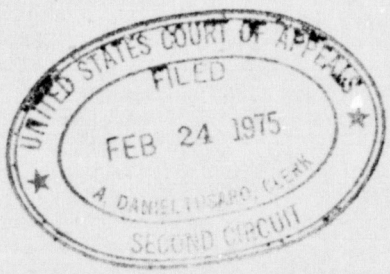


JOHN A. DOOLEY, III
Vermont Legal Aid, Inc.
150 Cherry Street
P.O. Box 562
Burlington, Vermont 05401

Counsel for Plaintiff-
Appellants

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B. Whether regulations promulgated and enforced by Defendant, Vermont Commissioner of Social Welfare, which set maxima on shelter allowances in the Aid to Needy Families with Children (ANFC) Program which are more favorable to recipients in the State of Vermont, other than Chittenden County, than they are to recipients of Chittenden County violate the Social Security Act and regulations promulgated by the United States Department of Health, Education and Welfare thereunder.

## II. STATEMENT OF THE CASE

### A. Nature of the Case

This case involves an appeal from two judgments of the United States District Court for the District of Vermont on the conformity of three Vermont Aid to Needy Families

1/ Defendant-Appellee has cross-appealed on the issue of whether the elimination of fire insurance benefits as a special need item in the ANFC program violated Section 402(a)(23) of the Social Security Act. Plaintiff-Appellant has not briefed this issue at this time but, pursuant to FRAP 28(c), will submit a reply brief addressing herself to the issue.

with children (ANFC) welfare policies and regulations with the Social Security Act and regulations promulgated thereunder. In her complaint, plaintiff presented constitutional claims requiring the convening of a three-judge court. However, by stipulation, the parties agreed that the pendent statutory claims - now before this court - could be heard by a single judge prior to the convening of a three judge court. See Appendix at A-20. It is from the orders of the single judge that both parties have appealed.

B. Course of Proceedings below

On June 9, 1971, plaintiff, Therese Roberge, filed this class action on behalf of herself, her minor children and all persons similarly situated, alleging that certain regulations and policies issued and enforced by defendant, Joseph Betit[2/] - Commissioner of Social Welfare of the State of Vermont - denied plaintiffs equal protection of the laws and violated the Social Security Act, 42 U.S.C. § 601 et seq. Plaintiff sought declaratory and injunctive relief, and, because regulations of state-wide applicability were being challenged, the convening of a three-judge district court under 28 U.S.C. § 2281. Jurisdiction was based on 28 U.S.C. § 1343.

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2/ During the course of this litigation Paul Philbrook replaced Joseph Betit as Commissioner of Social Welfare. The District Court, on stipulation of the parties, allowed substitution of Paul Philbrook as Defendant in this action. See Transcript at p. 3.

In her complaint, Plaintiff challenged three separate, but related, policies of Defendant in administering the Aid to Needy Families with Children (ANFC) Program. See Appendix at A-5. First, plaintiff challenged the dollar maxima imposed by the Vermont Department of Social Welfare on shelter grants for ANFC recipients in Chittenden County, Vermont. While these maxima are higher than for the remainder of the State, plaintiff alleged that the maxima were not sufficiently higher to account for the differences in shelter costs between Chittenden County and the rest of the State of Vermont. Plaintiff alleged that the failure to set rental maxima in accordance with actual cost differentials between Chittenden County and the remainder of the State denied ANFC recipients equal protection of the laws under the 14th amendment to the United States Constitution and violated the Social Security Act, 42 U.S.C. § 601 et seq, and regulations promulgated thereunder.

In her second challenge, plaintiff alleged that prior to November 1, 1970, she received a shelter "exception" whereby she was alloted ANFC shelter benefits above the applicable maximum b ause she paid rent over the maximum. She further alleged that all such "exceptions" were revoked by Defendant on November 1, 1970 - resulting in a decrease in the ANFC grant of plaintiff and other residents of Chittenden County - and that this deletion of exceptions denied her, and members of her class, equal protection of the laws and violated Section 402(a)(23) of the Social Security Act, 42 U.S.C. § 602(a)(23), and regulations adopted pursuant thereto.

In her third challenge, plaintiff alleged that prior to November 1, 1970, she received a special ANFC allotment for fire insurance but that this allotment was revoked by Defendant on November 1, 1970 when fire insurance allotments were placed under the shelter maxima. She alleged that this action violated Section 402(a)(23) of the Social Security Act, 42 U.S.C. § 602(a)(23), and regulations enacted pursuant thereto.

Defendant answered plaintiff's complaint by denying most of the relevant allegations. Defendant also moved to dismiss the action for failure to state a claim on which relief could be granted, failure to exhaust state administrative and judicial remedies and lack of jurisdiction. See Appendix at A-12. Subsequently, defendant indicated by letter to the court that he would not pursue the jurisdictional defense and defendant has not since argued or briefed jurisdiction or exhaustion of State remedies. See Appendix at A-14.

The district court issued an order allowing class action status and setting notice requirements. See Appendix atA-15. December 10, 1971, the parties stipulated that the pendent statutory claims could be heard by a single judge before the convocation of a three-judge court. See Appendix at A-20.

On March 8, 1972, plaintiff filed a Motion for Summary Judgment on all issues, together with various documents produced in discovery. See Appendix at A-21. Defendant filed a counter motion for summary judgment on the intra state shelter

maxima differential question and resisted summary judgment on all other issues. See Appendix at A-31. On April 24, 1972, the motions were heard before Circuit Judge James L. Oakes, sitting by designation, and, on the basis of the arguments and the documents and affidavits submitted, Judge Oakes on October 13, 1972 issued an opinion and order denying plaintiffs' motions for summary judgment and granting defendant's motion on the issue of geographical differentials in the AFDC shelter maxima. See Appendix at A-39.

The action was then tried before District Judge Albert W. Coffrin on September 9, 1973. On May 9, 1974, Judge Coffrin issued an opinion finding that the deletion of shelter exceptions was not unlawful but that the deletion of fire insurance grants violated Section 402 (a) (23) of the Social Security Act. See Appendix at A-60. On July 19,1974, Judge Coffrin issued a judgment order. See Appendix at A-75.

On August 19, 1974, plaintiff filed a notice of appeal to this court appealing from Judge Oakes' order of October 23, 1972 and Judge Coffrin's opinion of August 19, 1974. Defendant filed a notice of appeal from the judgment order of July 19, 1974.

C. Disposition of Court Below

The opinions of Judge Oakes and Judge Coffrin, and the judgment order of Judge Coffrin, are not reported. They are reproduced in the Appendix at A-39, A-60, A-75.

D. Statement of Facts

Facts relevant to the shelter exception and fire insurance issues were found by Judge Coffrin in his opinion of May 9, 1974. See Appendix at A-60 through A-65. Appellant believes more, largely undisputed, facts are relevant to the issues before this court and has therefore, supplemented Judge Coffrin's findings in the following statement.

Vermont participates in the Aid to Needy Families with Children Program (called Aid to Families with Dependent Children (AFDC) or Aid to Dependent Children (ADC) in most states) under Title IV of the Social Security Act. Vermont like most states defines a standard of need for ANFC recipients, dependent on family size and consisting of a number of components. Also like most states, Vermont has a standard of assistance payments, which for any component may or may not be equivalent to the standard of need.

At all times material to this proceeding, Vermont's ANFC standards of need and payment had three main components. The first component covered so-called "basic needs", that is, food, clothing, personal incidentals, fuel, utilities and chore service. The need standard for these "basic needs" constituted an aggregate average varying only by family size and total number of persons in the household. For example, in 1970 the basic need standard for an assistance group of two persons in a household of two persons was $137 dollars - and did not vary based upon individuals particular needs. Immediately prior to November 1, 1970, the Vermont Department of Social Welfare paid 89.5% of the basic need standard to recipients. On November 1, 1970, the payment standard was

raised to 100% of basic need. See Plaintiff's Ex. No. 1 (Appendix of Exhibits at A-3).

A second component of the overall Vermont AFDC need standard covered the cost of shelter. In 1966, the standard of need was equivalent to what the individual paid for shelter See Plaintiff's Ex. No. 3 (Appendix of Exhibits at A-21). On July 11, 1967, maxima were added to the shelter need standards which had the effect of setting the upper limit on what shelter cost the Department of Social Welfare would recognize. See Id. Up until May 1, 1970, the shelter maxima on rents were as follows:

| | CHITTENDEN COUNTY | REMAINDER OF STATE |
|---|---|---|
| Unfurnished | 100 | 95 |
| Furnished | 120 | 120 |

There was differnetial between Chittenden County and the remainder of the State of Vermont because surveys showed that Chittenden County rents were higher. See Plaintiff's Ex. Nos. 4, 5 (Appendix of Exhibits at A-22, A-23).

On May 1, 1970, in order to comply with § 402(a)(23) of the Social Security Act, 42 U.S.C. § 602(a)(23), the Department of Social Welfare updated the shelter maxima to reflect increases in shelter costs between the Spring of 1967 and the Spring of 1969. The shelter maxima were raised approximately 3.5% to $104 (unfurnished) and $124 (furnished) in the remainder of the State. See Joint Proposal for Findings of

Fact, No. 9 (March 7, 1974).[3/]

The payment standard for shelter is identical to the need standard except possibly for the effect of exceptions as discussed below.[4/]

In certain instances prior to November 1, 1970, the Department of Social Welfare allowed payments for shelter above the applicable maxima by use of shelter "exceptions." The parties are in dispute as to whether such 'exceptions' are properly part of the need standard or represent payments in excess of the need standard. However characterized, the 'exceptions' were granted by the Director of Family Services of the Vermont Department of Social Welfare on a showing of financial or social hardship. See Joint Proposal for Findings of Fact, Nos. 12-14 (March 7, 1974). A majority of shelter exceptions requested were granted. Id., No. 15.

On November 1, 1970, shelter exceptions were deleted for new and existing ANFC cases. There was no corresponding increase in the ANFC shelter maxima. As a result, a number of ANFC cases were closed because outside income exceeded the ANFC payment schedule without the shelter exception. See

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3/ At trial, Judge Coffrin requests the parties to submit a joint proposal for findings of fact, to simplify the issues and show where the parties agreed and disagreed. Not all jointly proposed findings were adopted by Judge Coffrin since many were not relevant to his theory of the case. The joint proposals agreed upon are, however, essentially stipulations of fact and are referenced in this statement of facts.

4/ For a discussion of a similar system of paying shelter costs in an AFDC program see Roselli v. Affleck, 373 F. Supp. 36 (D.R.I. 1974).

Transcript p. 187 (Testimony of Bert M. Smith).

A third component of Vermont's overall AFDC need standard is special needs, including such items as telephone, school transportation and home repairs. One item of special need included prior to November 1, 1970 was fire insurance - defined as follows:

> Current cost of fire insurance, including coverage for smoke damages, or household contents.

Vt. Family Services Manual, § 2211.31(2), in Plaintiff's Ex. No. 2 (Appendix of Exhibits at A-18). This item was part of the need and payment standard irrespective of the amount paid by a recipient for shelter. See Findings of fact No. 13, Appendix at A-63.

On November 1, 1970, defendant changed the treatment of fire insurance by removing it as a special need item and placing it into the shelter standard subject to the preexisting shelter maxima. See Findings of Fact No. 15, Appendix at A-64. As a result, fire insurance payments were allowed only if the recipient's shelter allotment was not up to the applicable maximum and then only to the extent that the combined cost of shelter and fire insurance did not exceed the shelter maximum. Id. Despite the inclusion of a new item into the shelter component, the shelter maxima were not upwardly adjusted to reflect the cost of this item. Id., No. 16.

At the same time as fire insurance was subjected to the shelter maxima, all other special need items were ratably reduced 100% - that is, eliminated. Subsequently, the

Department of Social Welfare averaged the costs of all deleted special need items across the whole recipient caseload at $2.18 per recipient and included this in the basic need standard. Id. Nos. 18, 19. Fire insurance was included in this average at $.16 but because of rounding to $2.00 per recipient did not result in any increase in the basic need standard. Id., Nos. 20, 21.

There are various comparisons in evidence that show the impact of the deletion of shelter exceptions and fire insurance in relation to all or part of the AFDC program. Immediately prior to November 1, 1970, 4.2% of all AFDC cases including a shelter component had shelter exceptions. See Id. Nos. 2, 3. In Chittenden County 8% of all cases having shelter grants had exceptions immediately prior to November 1, 1970. Id., No. 4. Shelter exceptions comprise 5% of all AFDC expenditures statewide and 1.6% of all shelter expenditures. Id., Nos. 5, 6. In Chittenden County, they were 1.2% of all AFDC expenditures and about 3% of all AFDC shelter expenditures. Id., Nos. 7, 8.

159 AFDC recipient families had shelter exceptions in October, 1970; of these, 77 were in Chittenden County. Defendant's Exhibit A (Appendix of Exhibits at A-34). The average amount of each shelter exception was $23.61 per month. See Transcript p. 105. Averaged across all AFDC recipients (as distinguished from recipient families) in the State, the cost of shelter exceptions was $.28 per recipient per month. Defendant's Exhibit D (Appendix of Exhibits at A-37).

The update in shelter maxima from the Spring of 1967 to the Spring of 1969 to comply with § 402(a)(23) of the Social Security Act cost the Department of Social Welfare $2,650 per month in increased shelter payments. See Defendant's Ex. E (Appendix of Exhibits at A-35). The savings to the Department of Social Welfare from the deletion of shelter exceptions was $3,754 per month. See Id.

Prior to November 1, 1970, 10% of the AFDC caseload received an allotment for fire insurance. See Findings of Fact No. 14 (Appendix at A-64). The average amount per case was $5.50. See Defendant's Ex. E (Appendix Exhibits at A-38).

Plaintiff, Therese Roberge, was a recipient of AFDC during 1970 for herself and her minor children. During that year she paid rent of $125 per month and fire insurance premiums of approximately $48 per year. See Findings of Fact, Nos. 1, 12 (Appendix at A-61, A-63). Prior to November 1, 1970, plaintiff, pursuant to a shelter exception, received an AFDC shelter grant of $125 per month and a fire insurance grant of $4 per month. Id. On November 1, 1970, plaintiff's shelter grant was reduced to $104 per month (the applicable maximum) and her fire insurance allotment was eliminated. Id., Nos. 11, 17.

## III. ARGUMENT

A. The Elimination by Defendant of Shelter 'Exceptions' In The AFDC Program Violated Section 402(a)(23) of the Social Security Act, 42 U.S.C. § 602(a)(23), and Regulations Promulgated Thereunder.

1. The Policy behind § 402(a)(23) of the Social Security Act prohibits paring benefit levels while maintaining dollar maxima.

Section 402(a)(23) of the Social Security Act, 42 U.S.C. § 602(a)(23) provides:

> [t]hat by July 1, 1969, the amounts used by the State to determine the needs of individuals will have been adjusted to reflect fully changes in living costs since such amounts were established, and any maximums that the State imposes on the amount of aid paid to families will have been proportionally adjusted.

The statute is divisable into two parts, each describing a separate function the state must perform to its AFDC program by July 1, 1969. First, the State must adjust the amounts used to determine the need of recipients to reflect updated cost of living indices. Second, the State must proportionally adjust maxima on payment.

In Rosado v. Wyman, 397 U.S. 397 (1970), the Supreme Court ascribed two different purposes to the two components of § 402(a)(23). Rosado involved the compliance of New York's AFDC program with § 402(a)(23). New York's program, like Vermont's, had a basic need standard along with special need items available to those who had the individual need. Payments in New York were ostensibly set at 100% of need. However, in 1969, the whole need and payment determination was radically altered; special needs were dropped and maxima imposed on payment levels.

In analyzing the New York program, the Court separated the need statements expressed in average dollar amounts from the payment maxima. The effect of § 402(a)(23), the Court

held, was to require an update of the average dollar amounts as an expression of need, but the state could take a "ratable reduction" from the need levels in setting payment levels. The main effect of § 402(a)(23) was to require a truthful, updated statement of need so that the political impact of any differential between need and payment would be apparent.

The effect of § 402(a)(23) on payment maxima was found to be different. These, the Court found, had to be updated absolutely - with no ratable reduction possible - because:

> [B]y imposing on those states that desire to maintain 'maximums' the requirement of an appropriate adjustment, Congress has introduced an incentive to abandon a flat "maximum" system, thereby encouraging those states desirous of containing their welfare budget to shift to a percentage system that will more equitably apportion those funds in fact allocated for welfare and also more accurately reflect the real measure of public assistance being given.

397 U.S. at 413-14. In short, the Congressional purpose is not to allow cutting of cost through dollar maxima. Thus, dollar maxima once updated under § 402(a)(23) must remain at least at the updated level. See, e.g., Alvarado v. Schmidt, 317 F. Supp. 1027 (W.D. Wis. 1970); DHEW, State Letter at 5 (Oct. 17, 1969) (copy attached as Appendix A, infra).

The few lower court cases that have dealt with dollar maxima after Rosado have emphasized the strong statement of Congressional purpose. In Alvarado v. Schmidt, 317 F. Supp. 1027 (W.D. Wis. 1970), the court was faced with the imposition of maxima after July 1, 1969 (where there had been none before) with the effect of paring benefit levels. Noting that a state

could not, consistent with § 402(a)(23), reduce maxima after July 1, 1969, the Court found

> This requirement of raising benefit levels if a state chose to use a maximum system is the incentive spoken of in Rosado to abandon maximums if a state desires to keep its payments down. In light of this intended effect of § 402(a)(23), it would follow that if a state elects after July 1, 1969, for the first time to impose a maximum, as Wisconsin has elected to do, the newly initiated maximum may not have the effect of reducing the earlier level of actual benefits.
>
> . . .
>
> The Congressional intent was to discourage maximums not to provide an incentive for their adoption.

317 F. Supp. at 1036-37. See also Alvarado v. Schmidt, 369 F. Supp. 447 (W.D. Wis. 1974).

In Utah Welfare Rights Organization v. Lindsay, 315 F. Supp. 294 (D. Utah 1970), the defendant had set maxima and properly updated them but had taken a non-updated percentage reduction from the maxima. In light of the strong congressional purpose against allowing benefits to be pared while the state continues a maximum system, the court held that the percentage reduction of a maximum violated Section 402(a)(23).

Plaintiff submits that the strong policy statement expressed in Rosado controls the disposition of this case. In May of 1970, defendant performed the § 402(a)(23) mandated update of shelter maxima to reflect increases in cost of shelter from the Spring of 1967 (when the maxima were imposed) to the Spring of 1969. See Plaintiff's Ex. No. 5 (Appendix of Exhibits at A-23).

The update came to 3.5% and resulted in increased expenditures of $2,650 per month in shelter costs. See Id., Defendant's Exhibit B (Appendix of Exhibits at A-35). On November 1, 1970, defendant deleted all shelter exceptions in the AFDC program - there were 159 such exceptions of average amount of $23.61 per month. See Transcript P. 105. The savings to the Vermont Department of Social Welfare from deletion of shelter exception was $3,754 per month. See Defendant's Exhibit B (Appendix of Exhibits at A-35).

Thus, in effect, by deleting shelter exceptions defendant has rolled back the fiscal impact of the § 402(a)(23)- mandated update in shelter maxima. In doing so, he has violated the purpose of § 402(a)(23) and, therefore, the section itself. Without getting into more detailed analysis, plaintiffs submit that the paring of benefit levels accomplished is unlawful per se.

2. Shelter Exceptions were part of the Vermont AFDC Shelter maxima.

The literal wording of § 402(a)(23) requires proportional adjustment and maintenance only of "maximums that the State imposes on the amount of aid paid to families ...". While appellant submits that in view of the clear Congressional purpose as explained in Rosado, the deletion of shelter exception is clearly covered, appellee has argued that shelter exceptions were not part of the rental maxima and their deletion was not a reduction in the shelter maxima.

In his opinion of October 14, 1972, Judge Oakes found-

> Defendant's own affiant alleges that one of his responsibilities bearing on rental exceptions was "the formulation and interpretation of regulations and policies" to deal with requests. (Affidavit of Vasili L. Bellini). This is persuasive evidence that there were overall policy guidelines to deal with exception requests and that they were not left solely to the discretion of individual welfare officials.
>
> But even if exceptions were totally at administrative discretion there would be strong policy reasons to hold they were still part of the rental maximums. One of the great complaints poor people have about the welfare system is the arbitrariness of some of its administrators. ... To allow benefits granted to a significant number of AFDC recipients to be eliminated because no administrative standards existed to determine who received them would be to encourage states to adopt standardless programs and eliminate them with financial impunity everytime welfare budget cuts were required by internal state politics. Thus, the scope of opportunity for arbitrariness on the part of the welfare officials might be increased.

Appendix at A-55, A-56. Judge Coffrin found that shelter exceptions were part of the standard of need. Appendix at A-65.

The question of whether exceptions were a part of the shelter maxima involves, at best, theoretical concepts with almost no relevance to any practical consequences. The only possible consequence of asserting shelter exceptions were not part of the maxima is that such exceptions could not be used to establish AFDC eligibility or to

continue eligibility.[5] Nowhere in the regulations of the Vermont Department of Social Welfare is such a policy stated.[6] The administrators who testified at the hearing

5/ The Joint Proposals for Findings of Fact No. 17 contained a hypothetical to demonstrate what is meant by using shelter exceptions to establish eligibility:

> A Chittenden County family has basic needs of $250 per month and pays $150 per month for rental of an unfurnished apartment so that if the family is eligible for AFDC and has no outside income, it would receive a grant of $354 ($250 and $104 shelter maximum). However, that family has outside unearned income of $360 per month. If a shelter exception can be used to establish initial eligibility, the recipient could apply for AFDC and request a shelter exception at the same time. If the shelter exception is granted, the family would be found eligible.

Use of the hypothetical, with some variation, demonstrates the use of a shelter exception for continuing eligibility. Assume the same family has no unearned income at time of application and is given a shelter exception. Thereafter, if the family receives unearned income of $360 per month and shelter exceptions can be used to support continuing eligibility, the family would remain eligible. Otherwise, they would be cut off.

6/ The applicable regulations prior to November 1, 1970 stated:

> Recurring shelter expense for maintaining a home is included as paid up to the limits indicated
>
> . . .
>
> Exceptions to the above maximums in special circumstances may be allowed with the approval of the Director of Family Services.

Plaintiff's Exhibit No. 2 (Appendix of Exhibits at A-18). After November 1, 1970, shelter exceptions were continued in the companion Aid to the Aged, Blind and Disabled (AABD) Program. The applicable regulations stated under the heading - "Need Standards - Household or Housing Unit":

> In unusual circumstances the commissioner may make whatever modifications of the ... shelter standards as he deems necessary for a particular case in the AABD program.

Family Services Policy Manual § 2211 in Plaintiff's Exhibit 1 (Appendix of Exhibits at A-5).

in this action each had different views on the use of shelter exceptions to establish initial or continuing eligibility.[7/] In practice, shelter exceptions had been

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7/ The Director of Family Services in 1970, Vasili Bellini, testified that shelter exceptions could be used for continuing but not initial eligibility. See Transcript pp. 52-56. The Assistant Director of Family Services in 1970, Bert Smith, testified that shelter exceptions could be used for neither continuing nor initial eligibility. Transcript pp. 169, 185-6. The Burlington District Director in 1970, Perry Kinsley, testified that shelter exceptions could be used to establish either continuing or initial eligibility. Transcript pp. 78-81.

With respect to Mr. Bellini's testimony, the Social Security Act does not authorize different standard for initial and continuing eligibility. Both must be based on need. See 45 C.F.R. § 233.20(a)(23)(viii).

There were more contradictions in the testimony than the above. Mr. Smith testified that the principle that shelter exceptions were not part of the shelter need standard was inherent in the word "exception". Transcript pp. 184-85. Yet, non-recurring special needs, which were part of the need standard, were often termed exceptions and requested on a form called "request for an exception". See Transcript pp. 58-59.

The Vermont Department of Social Welfare is subject to the Vermont Administrative Procedures Act, 3 V.S.A. § 801 et seq., and none of its policies are effective unless promulgated as rules under the Act. See 3 V.S.A. § 802(b). Thus, the unwritten understandings of administrators are not law or policy but merely show how the AFDC program may have operated.

used to continue eligibility since recipients were cut-off in 1970 as a result of the deletion of exceptions. See Transcript p. 197.

Even if shelter exceptions had not in practice been used for initial or continuing eligibility, they still should be considered part of the maxima. The shelter maxima are the Vermont shelter need standard. See Transcript pp. 47-8. If shelter exceptions were not part of the shelter maxima, they were payments in excess of need. See Transcript pp. 48. Yet, under the Social Security Act, eligibility for and payments in the AFDC program must be based on need. See Marotti v. White, 342 F. Supp. 323 (D. Conn. 1972). Federal matching is not available for payments in excess of need. See 45 C.F.R. §§ 233.20(a)(3)(viii), 233.20(b)(2), (3). Since shelter exceptions were made with federally assisted funds, one must believe that shelter exceptions had been granted illegally to accept appellee's conclusion that exceptions were not part of the maxima.

Appellant submits that although the technical analysis suggested by appellee leads to the conclusion that shelter exceptions were part of the shelter maxima, this analysis is unnecessary. The mere fact that the fiscal impact of eliminating shelter exceptions was to more than wipe out the § 402(a)(23) mandated shelter update shows that shelter exceptions were part of the maxima for purposes of § 402(a)(23). Any other result would allow paring of benefits in the context of a maximum system, exactly what § 402(a)(23) was intended to prevent.

3. The Overall Significance of Shelter Exceptions is irrelevant. If relevant, shelter exceptions were a significant part of the AFDC Program.

In his opinion of May 9, 1974, Judge Coffrin phrased the question before him as "whether the shelter exception program eliminated by the Department of Social Welfare on November 1, 1970 was a significant or insignificant part of Vermont's AFDC program." See Opinion and Conclusions of Law (Appendix at A-65, A-66). In phrasing this question, the court relied upon the language of Rosado dealing with the elimination of special needs. The court found New York's elimination of special needs to be unlawful because "particular items, such as laundry, telephones, had formerly been deemed essential by New York, and were considered regular recurring expenses to a significant number of New York City welfare recipients." 397 U.S. at 418. Using this approach, the lower court in this case held that since only 4.2% of Vermont AFDC recipient families had shelter exceptions, the elimination of exceptions was sufficiently insignificant or de minimis so as to be outside the operative scope of section 402(a)(23) as construed in Rosado. See Opinion and Conclusions of Law (Appendix at A-68).

Appellants submit that the lower court's approach was erroneous. The quoted language from Rosado dealt with the deletion of an item of need without averaging it into basic needs, and not reduction of a maximum. In essence,

the lower court treated shelter exceptions as a separate special need item wholly unrelated to shelter or the shelter maxima. However, as demonstrated supra and found by Judge Oakes, exceptions were part of the shelter maxima and had to be treated as such.

While Rosado allows the deletion of insignificant special need items from the overall need standard, it nowhere authorizes reducing maxima even to an insignificant degree.[8/] The only other court to consider the issue held, in dealing with a payment maximum on a special need item:

> [T]o comply with the statute defendant must increase that maximum by the cost-of-living increase that occurred between the time the maximum was set and January 2, 1969. The possible insignificance of the amount involved does not make the statutory mandate any less compelling.

Alvarado v.Schmidt, 369 F. Supp. 447, 455 (W.D. Wis. 1974). This conclusion certainly follows from the statutory purpose that states will suffer a financial penalty from maintenance of a maximum system. If the deletion of shelter exceptions can be found insignificant, then it follows that the state could reduce the shelter maxima

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8/ While relying generally on the Rosado test of significance for his holding, Judge Coffrin also depended upon the holding of Johnson v. White, 353 F. Supp. 69 (D. Conn. 1972) that a 2 per cent "deviation" was de minimis. Johnson, however, dealt with an issue entirely different from the reduction of a maximum in this case or the elimination of a special need in Rosado. Johnson involved the statistical significance of a 2% margin of error in the averaging process. It is of no precedential value for the issues in this case. Moreover, the state in Johnson had averaged in shelter exceptions in going to an average system.

themselves as long as the impact is no greater. In this case, the lower court's holding would authorize a cut in the shelter maxima of well over 3.5%.

Even if the significance of the deletion of shelter exceptions to the overall AFDC program is relevant, the deletion should be found significant. In determining the significance of shelter exceptions, the court below concluded that the relevant methodology in this case is to compare the number of cases receiving shelter exceptions with the entire AFDC caseload.[8] For reasons stated below, appellants submit that at least two other tests of significance are more consistent with the purposes of § 402(a)(23), and that the use of the Court's test shows significance.

Appellants submit that the most valid test of the significance of deletion of shelter exceptions - where, as here, a maxima is effectively being reduced - is to compare the fiscal gain to the state of the deletion to the fiscal loss from updating the maximum under § 402(a)(23). This test allows the court to evaluate defendant's action directly in the light of the congressional purpose of penalizing states for maintaining payment maxima and does not introduce into the comparisons other items of need not subject to a maximum. As indicated in Section 1 of this argument, such a comparison clearly shows significance since the state, through deletion of shelter exceptions, has more than rolled back the § 402(a)(23) mandated update in shelter standards.

A second test of significance is to look at the effect of deletion of exceptions from the perspective of recipients who had exceptions. This qualitative approach has been used in Rhode Island Fair Welfare Rights Org. v. Department of Social and Rehabilitative Services, 329 F. Supp. 860 (D.R.I. 1971) and referenced with approval in a number of other cases. See, e.g., Roselli v. Affleck, 373 F. Supp. 36 (D.R.I. 1974), Alvarado v. Schmidt, 369 F. Supp. 447 (W.D. Wis. 1974). Rhode Island Fair Welfare Rights Org. involved the aggregation of certain special need items into an emergency assistance allowance, with extensive new restrictions on the availability of the items. The court noted:

> Admittedly what the State of Rhode Island has done here is less drastic [than elimination of special needs], but Rosado held that § 402(a)(23) is violated by a substantial alteration in the content of the standard of need... . The imposition of restrictive conditions can be just as effective as the total elimination of items in achieving the result held impermissable in Rosado.

329 F. Supp. at 867. The court then held:

> This court's position is that, even apart from the particular items referred to above, the state's adoption of that program in lieu of certain former special needs items violates § 402(a)(23), because it constitutes a substantial reduction in the content of the standard of need as previously defined by Rhode Island. Whereas recipients were previously entitled to payments for household furnishings and equipment, indebtedness and moving expenses as needed, the availability of assistance for those needs has been curtailed severely.

329 F. Supp. at 870.

This court has, at least inferentially, adopted a qualitative approach to significance. In Rosado v. Wyman, 437 F.2d 619 (2d Cir. 1970), aff'd, 402 U.S. 991 (1971) (appeal after the remand from the Supreme Court's original opinion), New York argued that certain special needs - for example, diaper service, handicap allowance and guide fees - were insignificant and could be eliminated. This court rejected that argument holding, instead, that if an item were provided in 1968, it was incumbent upon the State to show some change in necessity to justify elimination.

The use of a qualitative approach clearly demonstrates significance in this case. The court need go no further than the Statement of Defendant (then Deputy Commissioner) to HEW in arguing that Vermont need not update shelter standards:

> As our plan material indicates ... we have provision for exception to our shelter maximum. With that safety valve available to cover the hardship case, I see no reason why we should be required to increase the shelter maximums. During calendar 1969 our records show that in only 55 cases was it necessary to grant an exception to our shelter maximum. Our average monthly caseload during this time period was approximately 3,000 families.

Plaintiff's Exhibit No. 5 (Appendix of Exhibits at A-32). The standard for granting shelter exceptions was financial or social hardship. See Joint Proposal for Findings of Fact, No. 14 (March 17, 1974). It is difficult to conceive of an item more significant to recipients than one intended

to eliminate hardships.[9/]

Directly relevant to significance, as this court found in Rosado, is a comparison of the need for an item before and after the operative date of § 402(a)(23). Surveys in evidence in this action show a steady increase in shelter costs from 1967 on - and, thus, an increase in reliance on the shelter exception policy. See Plaintiff's Exhibit Nos. 4, 5 (Appendix of Exhibits at A-22, A-23). The 55 cases cited by Defendant in his letter to HEW had nearly tripled to 159 cases in October of 1970 - one year later. See Defendant's Exhibit A (Appendix of Exhibits at A-34). By 1970, the average shelter exception was up to $23.61 - more than 20% above the standard. See Transcript p. 105.

A third method of establishing significance is to look to numerical or fiscal impact in a manner similar to that adopted by the lower court. Absent a clear meaning for the term "significant", any comparison process must be done in the light of other precedents. The record in this case shows that 5% of all recipients having shelter costs had exceptions (8% in Chittenden County). While the number of persons having the various special needs involved in other cases is not stated in the opinions, it can be inferred that

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9/ The importance of shelter exceptions has been noted by another court. In Metcalf v. Swank, 293 F. Supp. 260 (N.D. Ill. 1968), the court was faced with an equal protection challenge to the Illinois shelter maxima. The court found that the rental maxima would be arbitrary, discriminatory and thus unconstitutional if it were not for the exception provision.

more persons had shelter exceptions than handicap allowances or guide fees in New York (Rosado v. Wyman, 437 F.2d 619 (2d Cir. 1970), aff'd, 402 U.S. 991 (1971) or moving expenses in Rhode Island (Rhode Island Fair Welfare Rights Org. v. Department of Social and Rehabilitative Services, 329 F. Supp. 860 (D.R.I. 1971)).

If significance is looked at from the standpoint of fiscal impact, the lower court's opinion is internally inconsistent. The lower court found that the elimination of fire insurance needs was unlawful although they averaged only to $.16 per recipient per month. See Defendant's Exhibit E (Appendix of Exhibits at A-38). Shelter exceptions averaged at $.28 per recipient per month. See Defendant's Exhibit D (Appendix of Exhibits at A-37).

In summary, appellant argues that the deletion of exceptions was unlawful whether or not such exceptions were significant. If the significance of exceptions is relevant, the exceptions were significant under any test used.

B. Regulations Promulgated and Enforced by Defendant Setting Maxima on AFDC Shelter Allowances which are Less Favorable to Recipients in Chittenden County than the Rest of the State of Vermont Violate the Social Security Act and Regulations Promulgated Thereunder.

Title IV of the Social Security Act requires that State AFDC plans be in effect in all subdivisions of the State and be administered or supervised by a single state

agency. The legislative history of the Act clearly shows that the purpose of these requirements was to eliminate the variations in standards that existed in counties or municipalities within a state prior to the adoption of the Social Security Act. See Boddie v. Wyman, 434 F.2d 1207 (2d Cir. 1970), aff'd, 402 U.S. 991 (1971). With this Congressional purpose in mind, the United States Department of Health, Education and Welfare has enacted certain regulations strictly limiting the ability of a state to impose different AFDC payment levels in different parts of a state. These regulations require a state plan for AFDC to

> (1) Provide that the determination of need and amount of assistance for all applicants and recipients will be made on an objective and equitable basis ... .
>
> (2)(i)... Specify a state-wide standard, expressed in money amounts, to be used in determining (a) the need of applicants and recipients and (b) the amount of assistance payment
>
> . . .
>
> (iii) Provide that the standard will be uniformly applied throughout the State.

45 C.F.R. § 233.20(a)(1), (2)(iii).

HEW has interpreted this regulation as allowing regional standards but with limits:

> It is strongly recommended that, if at all feasible, identical cost standards also be used state-wide. Any variation in cost standards by areas within a state must be justified by facts. (Emphasis supplied).

DHEW, Simplified Methods for Determining Needs I (1964). There was a similar statement in the now superceded Handbook of Public Assistance Administration, Part IV - § 3120: "The money amount may vary with difference in cost objectively determined to exist with the State."

In Doddie v. Wyman, 434 F.2d 1207 (2d Cir. 1970), aff'd, 402 U.S. 991 (1971), this court determined the validity of the above regulations as applied to New York's basic need schedules. The New York AFDC basic need schedules set lesser need and payment levels for upstate New York than for New York City although all available evidence showed the needs of upstate residents were identical to the needs of New York City residents. The court found the HEW regulations valid and, on that basis, struck down the New York schedules. The court stated:

> New York cannot receive federal funds if it continues its system of intrastate differentials unless it can justify such differentials by a showing that they are based on actual differences in cost.

434 F.2d at 1211. See also Rothstein v. Wyman, 336 F.Supp. 328 (S.D.N.Y. 1970).

Vermont, unlike New York, has established different shelter maxima for Chittenden County than for the rest of the State of Vermont because Chittenden County costs are higher. However, in doing so, plaintiffs allege, defendant has failed to raise the Chittenden County shelter maxima sufficiently to meet the cost difference that in fact

existed in 1967 (when maxima were established) and exists today.[10/]

Appellants submit that the failure to fully take into account cost differentials in setting geographically disparate shelter maxima does violate the statewideness requirement as interpreted by Boddie. Both Boddie and the applicable HEW regulations require that intrastate differentials be based on actual differences in cost, objectively determined to exist. Vermont's differential on shelter maxima is not based on cost, objectively determined.

The lower court, while recognizing that Vermont's policies violated the literal wording of Boddie and HEW requirements, nevertheless held them valid, for two reasons. First, the court noted that there is no requirement on the State to meet intrastate cost differentials with intrastate differentials in need or payment standards. Second, the Court held that states have discretion in setting welfare levels and should be able to ameliorate

10/ This issue was decided by Judge Oakes below on summary judgment and, thus, there has not been full factual development. Plaintiff submitted with her motion for summary judgment various surveys obtained in discovery which showed a shelter cost differential well in excess of the $15 (pre-May 1970) and $16 differential (after May 1, 1970) set in AHFC regulations. Compare Plaintiff's Exhibit Nos. 4, 5 (Appendix of Exhibits at A-22, A-24, A-27) with Plaintiff's Exhibit No. 3 (Appendix of Exhibits at A-21). Defendant submitted an affidavit to show that the differential was cost justified. See Appendix at A-32. Judge Oakes relied on the affidavits to show that both Appellant and Appellee admitted there was some cost differential. See Appendix at A-41. He found irrelevant the amount of the actual cost differential.

a cost disparity without eliminating it where funds are limited.

For two reasons, appellants submit that the lower court's reasoning should be rejected. First, the State is never placed in the situation of having inadequate resources to maintain fully cost-justified shelter differentials. Rather than keeping the State shelter maxima the same and raising the Chittenden County maxima, the State could combine a raising of the Chittenden County standard with a lowering of the State standard to keep overall payments the same.[11/] There could be no question that maxima that give all recipients in the State an equal chance to receive fully their shelter costs are more fair than maxima that put Chittenden County residents at a disadvantage.

A second, more significant reason, is that enabling the State to meet a cost differential only partially is in conflict with the intent of § 402(a)(23). Payment maxima have the effect of obscuring the needs of recipients. See Rosado v. Wyman, 397 U.S. 397, (1970)(average systems 'more accurately reflect the real measure of public assistance being given'); Alvarado v. Schmidt, 317 F. Supp. 1027 (W.D. Wis. 1970). This effect is heightened in Vermont because the Department of Social Welfare puts forth the shelter

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11/ The State could have clearly adopted this approach before July 1, 1969 when § 402(a)(23) became effective. After that date, however, § 402(a)(23) would prevent lowering of a maximum. This penalty (the inability to lower a maximum) is one imposed by the congressional incentive to abandon maxima and not by the statewideness requirement.

maxima as the Vermont shelter need standard. See Transcript pp. 47-8. Yet, the shelter maxima in Chittenden County do not, at least in relation to the remainder of the State, accurately reflect need. In effect, the defendant meets only part of the cost differential but states to the public that he has wholly eliminated the differential.

In Rosado, the Supreme Court described one purpose of § 402(a)(23):

> [T]o require States to face up realistically to the magnitude of the public assistance requirement and lay bare the extent to which their programs fall short of fulfilling actual need . . .

397 U.S. at 412-13. This Court recognized the interrelationship of the Boddie principle and § 402(a)(23). See Rosado v.Wyman, 437 F.2d 619 (2d Cir. 1970), aff'd, 402 U.S. 991 (1971). Moreover, HEW has enacted a special regulation relating statewideness to maxima:

> a) A State plan . . . must . . .:
>
> . . .
>
> (3)(viii) Provide that payment will be based on the determination of the amount of assistance needed and that, if full individual payments are precluded by maximums or insufficient funds, adjustments will be made by methods applied uniformly statewide.

45 C.F.R. § 233.20(a)(3)(viii). Plaintiffs submit that the insufficient differentials present in Vermont's AFDC program are not consistent with this regulation - Vermont's shelter payments in Chittenden County are not based upon need; and the ostensible claim of meeting shelter need in Chittenden County wholly undermines the principles of Rosado

C. Conclusions

For the reasons stated in Part B above, Appellants urge this court to reverse the lower court's order of October 14, 1972 granting Defendant's motion for summary judgment on the intrastate shelter differential issue and remand for trial. For the reasons stated in Part A above, Appellants urge this Court to reverse the lower court's order of May 9, 1974 granting judgment for Defendant on the shelter exception issue and remand with instructions that the District Court order Defendant to restore shelter exceptions to the Vermont AFDC shelter policies.

Date: February 20, 1975

Respectfully submitted,

JOHN A. DOOLEY, III
Vermont Legal Aid, Inc.
150 Cherry Street
P.O. Box 562
Burlington, Vermont 05401

Counsel for Plaintiff-
Appellants

APPENDIX A - DHEW, State Letter (Oct. 17, 1969)

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE
SOCIAL AND REHABILITATION SERVICE
WASHINGTON, D.C. 20201

NCE PAYMENTS
NISTRATION

SRS-APA-PS
October 17, 1969

TO STATE AGENCIES ADMINISTERING APPROVED PUBLIC ASSISTANCE PLANS

Subject: Updating State's Standard of Assistance in AFDC--Interpretation of Social Security Act Section 402(a)(23) and 45 CFR 233.20(a)(2)(ii) -- See SRS Program Regulation 20-7, dated 1/29/69

A number of questions have been raised by States regarding interpretation of regulations on updating AFDC standards. (See SRS Program Regulation 20-7, dated 1/29/69). The following has been prepared to help State agencies in meeting these important requirements.

Social Security Act Section 402(a)(23)

"Provide that by July 1, 1969, the amounts used by the State to determine the needs of individuals will have been adjusted to reflect fully changes in living costs since such amounts were established, and any maximums that the State imposes on the amount of aid paid to families will have been proportionately adjusted."

45 CFR §233.20(a)(2)(ii)

"In the AFDC plan, provide that by July 1, 1969, the State's standard of assistance for the AFDC program will have been adjusted to reflect fully changes in living costs since such standards were established, and any maximums that the State imposes on the amount of aid paid to families will have been proportionately adjusted. In such adjustment a consolidation of the standard (i.e., combining of items) may not result in a reduction in the content of the standard. In the event the State is not able to meet need in full under the adjusted standard, the State may make ratable reductions in accordance with paragraph (a)(3)(viii) of this section. Nevertheless, if a State maintains a system of dollar maximums, these maximums must be proportionately adjusted in relation to the updated standards."

Interpretation

1. July 1, 1969

"By July 1, 1969," means the required updating will have been completed and all AFDC assistance payments will have been recomputed in accordance with revised amounts, and, if applicable, adjusted maximums and ratable reductions.

2. Amounts

a. "Amounts" means the money amounts or standards of assistance as defined and determined by the State for all goods and services (basic and special circumstance requirements) included within the State's regulations or other policy issuance and which are used as the criteria to establish need and the amount of the assistance payment.

b. The standards of assistance may be one all inclusive amount for the items included in the standard; it may be an amount for each group of items, or it may be individual amounts for each item.

c. Some States have consolidated their standard of assistance (i.e., have combined items) to simplify the determination of need. The updated revised or consolidated standard should be compatible in content and cost with the previous standards. As a minimum, the monetary amount of the consolidated standard must equal the total updated value of the former basic requirements.

3. "Reflect fully changes in living costs since such amounts were established" means that the State agency must identify when the amounts to determine need were last priced. A cost study of the AFDC amounts should have been completed between January 2, 1968, and July 1, 1969, and the changes in living costs from the date the amounts were last priced should have been determined.

4. Acceptable cost study methods

Method A

In those situations where the State plans provide for specified periodic cost reviews of the AFDC assistance standard of living on a continuing basis, such programmed cost studies conducted during above time period are satisfactory.

Method B

a. Using the U. S. Department of Labor, Bureau of Labor Statistics, Consumer Price Index, for the appropriate region determine the current index price for the applicable items of living;

b. calculate percentage change for the items in the index from the date the standard was last established to the present date;

c. apply the percentage change to each of the items or groups of items and determine dollar change;

d. total the dollar cost of standard as reviewed;

e. compare with existing standard to determine change.

Method C

The State may conduct a statewide cost study of the items of living included in the amounts to determine need. Results of such studies are used as basis for determining amount of dollar costs for the items in AFDC assistance standards.

Method D

State may contract for another agency to conduct statewide cost studies of items of living included in the AFDC standard of living and determine changes in cost of items in AFDC assistance standard.

Method E

States may choose to revise content of existing standard of living and conduct cost studies of revised standards. U.S. Department of Labor, Bureau of Labor Statistics Bulletin No. 1570-5, may be used as a reference to re-establish a low-income level of living based on 1967 costs. A review of the content of items of living in the U.S. Department of Labor budget for the lower living standard for a 4-person urban family is suggested; the State selects the items of living consonant with conditions practicable in such State for a public assistance standard of living. Such standard must then be updated from Spring 1967 (date of U. S. Department of Labor, Bureau of Labor Statistics, 3 Levels of Living Standards) costs to current costs. Cost estimates for the 39 urban areas, described in the aforementioned publication, are available by writing to the appropriate Regional Offices of the Bureau of Labor Statistics. Agency may wish to use U. S. Department of Labor, Bureau of Labor Statistics Bulletin No. 1570-2 Revised Equivalence Scale for estimating costs of families by size, age, etc.

Method F

For States who wished to revise existing public assistance standards but for whom the Bureau of Labor Statistics Urban Family of Four is not representative of the State's rural population as defined by the Bureau of the Census, a study of the U. S. Department of Labor and U. S. Department of Agriculture Consumption Study Data of 1960 and 1961 are suggested reference.

After selecting the recognizable items from such compiled data, costs for such items would need to be updated to current amounts to be used to determine need in AFDC.

Method G

The above suggested methods of updating standards does not preclude the acceptability of a different method which is identifiable, equitable, and objective.

5. Will Have Been Adjusted

a. "Will have been adjusted" means the amounts used by the State agency to determine need will have been corrected to reflect the changes in costs of living, since the amounts were last established. This adjustment in assistance standards must be made, even though other provisions regarding payment may offset it.

b. Adjusted amounts and costs study must bear a reasonable time relationship between cost study and the application into agency regulations. A cost study in early 1968, which was reflected in the agency's standard effective July 1, 1968, meets the requirements of the Act. However, if the agency did not adjust its standards until July 1, 1969, the cost study in early 1968 would not be acceptable; a more current study is needed.

c. In some instances, State agencies, during the period since standard was last established and July 1, 1969, have increased the money amounts (standards of living) from time to time, as a result of moneys becoming available from State or Federal legislation. These additional moneys, added to the standard of living, at irregular intervals should be calculated as an offset against the total change in living costs between date standard was last established and the date of updating.

6. "Any Maximums That the State Imposes on the Amount of Aid Paid to Families Will Have Been Proportionately Adjusted."

This applies to dollar maximums. State maximums established for items of living (such as shelter costs) or overall for grants or payments, must be corrected to show the change in living costs since such maximums were established to the appropriate period between January 2, 1968, and July 1, 1969, as selected by the State agency.

7. The State agency may make a ratable reduction. It is recommended that the State agency implement only one ratable reduction.

8. All AFDC assistance payments must be recomputed in accordance with the adjusted standards, and adjusted maximum and/or ratable reductions, when applicable. Implemented ratable reduction and adjusted maximums must be uniform statewide and objective.

9. States must maintain their adjusted standards after July 1, 1969, subject to the option of making further adjustments to reflect changes in living costs.

Sincerely,

John J. Harley
Acting Commissioner

IN THE UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

| | | |
|---|---|---|
| THERESE ROBERGE, On behalf of herself, her minor children and all persons similarly situated, Plaintiff-Appellants | : | |
| vs. | : | DOCKET NO. 74-2167 |
| PAUL PHILBROOK, Commissioner of Social Welfare, Defendant-Appellee | : | |

CERTIFICATE OF SERVICE

NOW COMES John A. Dooley, III, Esquire and Vermont Legal Aid, Inc., counsel for plaintiff-appellants, and certifies that two copies of BRIEF OF PLAINTIFF-APPELLANTS, one copy of JOINT APPENDIX OF EXHIBITS, and one copy of JOINT APPENDIX, were sent by first class mail, postage prepaid, to David L. Kalib, Esquire, Assistant Attorney General, counsel for defendant-appellee, at his last known office address, the Vermont Department of Social Welfare, Montpelier, Vermont 05602, this 20th day of February, 1975.

JOHN A. DOOLEY, III
Vermont Legal Aid, Inc.
P.O. Box 562
Burlington, Vermont

Counsel for plaintiff-appellants

MONT LEGAL AID
URLINGTON, VT.